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Supreme Court of the United States

October Term, 1951.

No. 309

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - Petitioner,

versus

THE B. F. GOODRICH COMPANY, - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

AND

BRIEF IN SUPPORT OF PETITION.

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Supreme Court of the United States

October Term, 1951.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - *Petitioner,*

v.

THE B. F. GOODRICH COMPANY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

Your petitioner, Louisville and Jefferson County Metropolitan Sewer District, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky (highest court of the State) entered in the above cause June 12, 1951 (R. 83).

OPINIONS OF STATE COURT.

The judgment or opinion of the Court of Appeals of Kentucky, review of which is sought, has not been officially reported, but is reported in 240 S. W. 2d 621. It became final on July 17, 1951. A certified copy of

the opinion will be found at pages 83 to 84 of the Record.

That judgment affirms a decision of the Jefferson Circuit Court granting respondent a perpetual injunction against any sewer charges. This injunction had been denied on the first trial (R. 57-58), but this respondent had appealed and the action was reversed (R. 59).

On the first appeal, the Kentucky Court of Appeals had to, and did, consider and determine two conflicting claims involving the Constitution of the United States. The previous decision is reported as Bond Brothers, etc., v. Louisville and Jefferson County Metropolitan Sewer District, *et al.*, etc., and *The B. F. Goodrich Company, Appellants,* v. *Louisville and Jefferson County Metropolitan Sewer District, et al., Appellees, etc.,* 307 Ky. 689, 211 S. W. 2d 867. This opinion is on pages 61 to 73 of the Record.

Pursuant to a 1946 Act of the Kentucky Legislature (now K. R. S. Chap. 76) the Metropolitan District established a schedule of sewer service charges to be collected from owners of all property served. (Exhibits "C" and "E," R. 32-38, 41-44.) Respondent immediately brought this action to enjoin collection of any charges from it. It claims that a judgment-contract gives it free sewer service (R. 3-4).

That contract was made in 1929 in the settlement of a condemnation action (Exh. "A," R. 26-27). At that time no statute authorized sewer service charges in Louisville. The contract did not mention such charges. The Chancellor held that the contract did not

provide for sewer service free (R. 58). On respondent's appeal, however, the Kentucky Court of Appeals held that the contract did entitle respondent to free use of the sewer (R. 66).

This interpretation of that contract made it necessary for that Court to consider legality of further performance of the contract. This required determination of two conflicting claims based on rights and duties under the Federal Constitution. Respondent claimed that the contract gave it a property right protected by the Federal Constitution. The Metropolitan District claimed that the statute requires that the charges be uniform within the same classification. This meant that even if the 1929 contract provided for free sewer service, the District could no longer legally furnish same. The schedule of charges was established to enable the District to perform its work "in the interest of public health and . . . providing adequate sewer and drainage facilities . . ." The District's position was then that after establishment of these rates, free sewer service would violate the Fourteenth Amendment.

Cotting v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 107, 46 L. Ed. 92, 108, 22 S. Ct. 30.

The first opinion recognized both constitutional rights, then held the property right superior, closing with these words (R. 72-73):

> ". . . we hold that the appellants' contract cannot be abrogated or their vested rights destroyed by imposing sewer service charges promul-

gated by the Metropolitan District without due compensation being made.

"The judgments are, therefore, reversed for consistent proceedings."

Despite efforts by petitioner to have proceedings consistent with the previous opinion, including determination of any just compensation, the Chancellor refused to file the amended answer, then granted respondent a perpetual injunction against collection of any sewer charges from it. The second judgment of the Court of Appeals affirmed this injunction without further discussion of the constitutional issues.

This petition for certiorari must, therefore, discuss both those decisions of the Kentucky Court of Appeals and their ultimate effect.

JURISDICTIONAL STATEMENT.

Jurisdiction of this Court is founded on Subsection (3), Section 1257, Title 28, United States Code. The validity of a State statute was drawn in question on the ground of its being repugnant to the Federal Constitution. The decision was in favor of the constitutional right claimed, and against the validity of the statute.

This decision then caused a more serious violation of the Federal Constitution, the prevention of equal protection to all sewer-users. Hence this right of sewer-users (duty of the Metropolitan District) makes an additional jurisdictional point for granting a writ of certiorari.

Sewer service charges, new to Louisville, were authorized by a 1946 legislative Act (K. R. S. 76.090). This statute requires any service charges "to be collected from all real property served" and that such charges "shall be uniform for all property falling within the same classification."

Respondent claims in its petition that exacting any charges from it "for the use of the sewer facilities is an impairment of the contract obligation" (R. 24). The petition claims this to be in violation of Section 10 of Article I of the Constitution of the United States, and takes property in violation of the Fifth and Fourteenth Amendments to said Constitution. These allegations were specifically denied in the Answer (R. 48-49).

The Chancellor interpreted the contract as meaning connections into, not use of, the sewer to be constructed. This interpretation made it unnecessary for him to consider the Constitutional questions. The first Court of Appeals decision changed this interpretation (R. 62-66). With the 1929 contract interpreted to mean free use of the public facilities, it then became necessary to consider the constitutional questions.

That opinion on the first appeal recognized the presence of the two constitutional questions—exercise of police power versus protection of contract rights. That opinion says as to police power (R. 66):

> "To accomplish that objective the full force of the power may be applied, and that may require that property rights be subordinated even though they are otherwise within the protection of the Constitution."

Despite this correct statement of constitutional principles, the Court of Appeals held that it was dealing with a question of supremacy and that the police power could not unreasonably invade private rights and violate rights guaranteed under the Federal Constitution (R 67).

The opinion closes with the holding that sewer service charges can not be imposed "without due compensation being made." The effect of the two decisions is that the property right is supreme over the exercise of the police power and to deny equal protection to all other sewer users.

Federal questions decided on that first appeal may, of course, be considered on this petition.

Louisiana Nav. Co. v. *Oyster Commission of Louisiana,* 226 U. S. 99, 57 L. Ed. 138, 33 S. Ct. 78;

Southern Railway Co. v. *Kentucky,* 274 U. S. 76, 71 L. Ed. 934, 47 S. Ct. 542;

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Republic Natural Gas Co. v. *Oklahoma,* 334 U. S. 62, 92 L. Ed. 1212, 68 S. Ct. 972;

Urie v. *Thompson, Trustee,* 337 U. S. 163, 93 L. Ed. 1282, 63 S. Ct. 1018, 11 A. L. R. 2d 252.

This judgment is final now. The injunction granted is perpetual. This was not true of the first decision. The case was returned for consistent proceedings.

At that time no injunction on this ground had ever been granted; none was directed. Consistent proceed-

ings might have been taken at the instance of one party or the other:

(a) Injunction against sewer charges *until due compensation* made;

(b) Filing of pleadings to determine due compensation (as in L. & N. R. R. Co. v. Crowe, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (n. s.) 848, cited in Ortega Co. v. Triay, Receiver, 260 U. S. 103, 67 L. Ed. 153, 43 S. Ct. 44).

(c) Filing of pleadings to determine just what sewer use was meant by sewage and drainage "from the first party's existing property";

(d) Granting injunction, in accordance with contract, for only the 1929 "existing property";

(e) Granting perpetual injunction from any sewer charges against Goodrich's described property.

It is evident that with the case in the situation on the first appeal, the constitutional questions might have been eliminated. And new ones might have arisen. The case had such possibilities then that it was not ready for application to this Court. This Court has always insisted that there be actual finality except where intermediate rulings may carry serious public consequences.

Catlin v. *United States,* 324 U. S. 229, 89 L. Ed. 911, 65 S. Ct. 631;

Radio Station W. O. W., Inc., v. *Johnson,* 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475;

Republic Natural Gas Co. v. *Oklahoma,* 334 U. S. 62, 92 L. Ed. 1212, 68 S. Ct. 972.

The highest court in Kentucky has now specifically decided two constitutional questions, denying equal protection of the law. This is contrary to the decisions of this Court, and this Court has the jurisdiction to consider and correct those errors. No other Court has now.

SUMMARY STATEMENT OF MATTER INVOLVED.

Prior to 1947 sewers in Louisville had been constructed by the City or by a former agency, the Commissioners of Sewerage. Construction had been financed principally from proceeds of bond issues, paid from taxes. Sewers had been maintained by the City through property taxes.

In 1946, the Kentucky Legislature authorized creation of metropolitan sewer districts "in the interest of public health and for the purpose of providing adequate sewer and drainage facilities." Such districts are empowered to supervise, operate and maintain the sewer system in cities of the first class and environs (K. R. S. 76.010).

Petitioner was organized pursuant to said Act. The Act does not give such districts any authority to levy taxes or require any appropriations from other public agencies. The Act authorizes a district to collect service charges, which must finance construction and maintenance of sewers, drains, treatment plants and other facilities (K. R. S. 76.090).

The Louisville and Jefferson County Metropolitan Sewer District by resolution provided for such charges

to begin in August, 1947 (Exhibits "C" and "E," R. 32-38, 41-44). Respondent is a sewer user. Its property is near one of the District's large sewers, the Southwestern Outfall. The right of way for this sewer was procured from respondent's predecessor through a condemnation suit. This suit was ended with a settlement or judgment contract (Exhibit "A," R. 26-27).

The deed for the right of way followed the terms of this contract, and one paragraph provides:

> "Second party (Sewage Commissioners) stipulates and agrees to construct suitable openings or connections into its main sewer on either side thereof, for first party's use in connecting its sewage and storm water or natural drainage from the first party's existing property." (Petition, R. 3-4.)

Respondent claims this contract runs with the land and gives to it a permanent right to free use of the sewer. The Metropolitan District claims that even if the contract be interpreted as giving the right to free use of the sewer, the 1946 Sewer District Act prevents further compliance. Section 76.090 provides in part:

> "(1) Upon taking and assuming control of such existing sewer and drainage system the district is authorized to establish a schedule of rates, rentals and charges, to be collected from all the real property served by the facilities of such district . . ."
>
> "(2) . . . Such schedule shall be uniform for all property falling within the same classification . . ."

In seeking to comply with that statute the Metropolitan District has sought to collect from all sewer users, including respondent, the regularly established charges. Respondent denies all liability, and at the same time claims that it should be classified with sewer-users located in the City. Its petition states in part:

> "It was and is the duty of the District to establish reasonable rates applicable uniformly to property falling within the same general classification, and the real estate owned by Goodrich falls within the same general classification as real estate situated within the limits of the City on which manufacturing plants are operated."

The petition then claims that applying rates higher than the City rates "denies to Goodrich the equal protection of law guaranteed to it by the provisions of the Fourteenth Amendment to the Constitution of the United States."

The question of classification was decided by the Chancellor in respondent's favor (R. 57). The Court of Appeals, however, upheld the classification in another case and only referred to this holding in the first opinion in this (R. 61). Since then the District has revised all rates to the City schedule.

Respondent's suit also seeks to enjoin collection from it of any sewer charges. The Chancellor denied this, on the idea that the contract provided for the right to connections, not to free use.

On respondent's appeal the Court of Appeals held that the contract does provide for free use of the sewer.

That opinion holds that this vested right can not be destroyed by imposing sewer service charged, "without due compensation being made" (R. 72-73). The action was reversed for consistent proceedings.

This direction was anomalous and confusing. The Metropolitan district had not brought any action to abrogate a contract. It performs public utility service, so raised the question as to legality of further performance of this contract. The holding of the Court of Appeals indicated that sewer charges were proper—upon making due compensation. The Metropolitan District tendered an Amended Answer attempting to determine "due compensation" (R. 76-81).

No question is raised here as to the position of respondent on the filing of this pleading. But the District is, by the injunction, required to violate the statute as to collecting service charges from all real estate and uniformity of rates. This is true, whether or not the respondent is entitled to, or has or has not received "due compensation." Respondent may look to its own rights for compensation, but the District should not be compelled to violate the Fourteenth Amendment to the Federal Constitution.

QUESTIONS PRESENTED.

The effect of the Court of Appeals' decision on June 12, 1951, is to require a publicly owned utility to provide free service to one of the property-owners making the greatest use (816,500,000 gallons per year) of this sewer system (R. 22). The rulings of the Ken-

tucky Court of Appeals in this case raise two important questions of constitutional law, to-wit:

1. Does providing free sewer service in violation of a State statute constitute a violation of the Fourteenth Amendment to the United States Constitution as denying equal protection of the law to all users?

2. Can a contract for free use of the sewer, claimed to be protected by Section 10 of Article I of the United States Constitution and by the Fifth and Fourteenth Amendments thereto, be enforced as a property right, when performance of this contract will violate the equal protection clause of the Fourteenth Amendment?

REASONS FOR GRANTING A WRIT.

The entire work of constructing and maintaining sewers and drains in Louisville, Kentucky, and some of the adjoining territory is in the hands of the Metropolitan Sewer District. This District does not have the authority to levy taxes and receives no appropriation from any other unit. Its sole source of revenue for both construction and operating expense is a service charge.

Prior to the 1946 Act under which this Metropolitan District was organized there was no legislative authorization for service charges. The validity of these charges has since been upheld. *Veail* v. *Louisville and Jefferson County Metropolitan Sewer District,* 303 Ky. 248, 197 S. W. 2d 413.

This right to make service charges against sewer users outside the City of Louisville was also specifically

upheld in *L. & J. Metropolitan Sewer District* v. *St. Matthews Sanitary Association,* 307 Ky. 207, 208 S. W. 2d 490. The operation of the sewer facilities by this District must be on the same basis to all users in the same classification. Respondent's petition asserts this very principle. In *L. & J. Metropolitan Sewer District* v. *Joseph E. Seagram & Sons,* 307 Ky. 413, 211 S. W. 2d 122, the Kentucky Court of Appeals specifically holds as to the District's rates that:

> "Discrimination in rates or services is not permitted by municipalities any more than private utilities."

Those decisions recognize operation of this District to be on a basis similar to other public utilities. So does the statute.

The imposition of sewer service charges is by a general regulation. The Metropolitan District has taken no specific action to abrogate any contract with respondent. The illegality of the free service results from that regulation. No supervising Commission enforces application of rates by the Metropolitan District. The District itself, as a public agency, must comply with the law. Hence it contends that further free service by it is illegal.

This Metropolitan Sewer District has attempted to provide sewer service to similar users on a uniform basis of charges. But the injunction now granted to respondent prevents this.

The opinion on the first appeal says in part (R. 66):

> "As we have observed today in the St. Matthews Sanitary Association opinion delivered to-

day, the construction of sewers and drains is a certain object of the police power."

The opinion then refers to the right to collect charges under this statute, and says further as to exercise of the police power (R. 66-67):

> ". . . We are here dealing with supremacy in such a conflict. The touch stone is necessity and reasonable relationship. It is fundamental that such an extraordinary power is not without limitation, for it may not operate unreasonably beyond the occasion or necessity of the case. It may not unreasonably invade private rights and thus violate those rights guaranteed under either the Federal or the State Constitution. 11 Am. Jur., Constitutional Law, Sec. 259."

The question of supremacy was then completely determined upon return of the case to the Circuit Court and the granting of the perpetual injunction. This supremacy of private contract rights over the State's exercise of the police power directly conflicts with the constitutional principle of equal protection to all sewer users.

The effect is to recognize the rights of an individual user of public facilities over the principle of equal rights required under the police power and the Fourteenth Amendment. This decision is not in accord with applicable decisions of this Court; it conflicts with them.

One case recognized by the Kentucky Court of Appeals opinion as controlling in regard to rates is *L. & N.*

R. R. Co. v. *Mottley,* 219 U. S. 467, 66 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A. (n. s.) 671. That opinion discussing a contract for free transportation says as to authorities (219 U. S. 485):

> "They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made."

The principles of this case have been recognized and enforced ever since. Any contract right which respondent may have had must be compensated some other way, as in *L. & N.* v. *Crowe,* 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (n. s.) 848. The contract is no longer valid. Hence the second question must be answered in the negative.

There is no governmental agency, such as a public service commission, to enforce laws against discrimination as to sewer rates. The Metropolitan District, as a municipal corporation performing utility services, however, must comply with such laws. In this case, after determination by the Kentucky Court of Appeals, that it had a contract for furnishing free sewer service, the District had a duty of resisting further performance if not legal. That is what happened in this case.

The Court of Appeals' judgment that sewer service must be provided free under that contract has caused continuous demands since that similar contracts be now made, as new easements are required. This Court can prevent the Metropolitan District from being com-

pelled to violate this statute. This Court alone now can prevent enforcement of this discrimination against other sewer users.

PRAYER.

WHEREFORE, petitioner prays that a writ of certiorari be issued by this Court directed to the Court of Appeals of Kentucky, to the end that the decision and judgment of that Court in this cause may be reviewed by this Court and the judgment of that Court be reversed.

BLAKEY HELM,
Attorney for Petitioner.

Supreme Court of the United States

October Term, 1951.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - *Petitioner,*

v.

THE B. F. GOODRICH COMPANY, - - *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF CASE.

Respondent owns a 54-acre tract of land in Jefferson County, Kentucky, southwest of Louisville near a stream known as Lower Paddy's Run. This land was in 1929 a part of a tract (170 acres) owned by Producers Wood Preserving Company. The Commissioners of Sewerage sought to condemn an easement across Producers' property for an open outfall sewer.

After reversal on the question of damage, the Commissioners changed the project to a closed concrete sewer. Then an agreed judgment was entered in the condemnation action and a deed to the easement was given. The Commissioners constructed a large concrete sewer through the easement.

The said sewer is, through legislative action, now a part of the system controlled and operated by the Louisville and Jefferson County Metropolitan Sewer District. Respondent now owns part of the land through which the sewer was built.

On the 54-acre tract respondent operates two large manufacturing plants, not there in 1929. The sewage from these plants passes into the large sewer (R. 2-3, 26, 62-63).

The judgment contract gave to the Commissioners a perpetual easement to lay covered sewers, but obligated them to fill the ditch even with or above the natural surface of the creek bed within 3 years.

The grantor was given the right at any time to fill the creek valley up to the level of the ground on each side. The contract also provided for the Commissioners constructing suitable openings or connections into the main sewer, "for defendant's use in connecting its sewerage and storm water or natural drainage from the defendant's existing property" (R. 26-27).

The connections were made. The sewerage and drainage were carried through this sewer free until August, 1947, when charges for sanitary sewerage only became applicable in Louisville (R. 20).

This litigation resulted. The Court of Appeals in the first opinion said the provision as to connections to the sewer "is not clear *prima facie.*" But it then held that this provision intended free use (R. 66). In another case decided the same day that Court held that a contract to allow the St. Matthews Sanitary

Association to connect with the Louisville sewer system meant only the same right which Louisville inhabitants had—connection with a service charge. *Louisville and Jefferson County Metropolitan Sewer Dist., et al.,* v. *St. Matthews Sanitary Assn.,* 307 Ky. 348, 208 S. W. 2d 490.

The Court of Appeals had indicated that due compensation must be paid before charges could be made. The Metropolitan District attempted to have all rights determined in this case. The Chancellor refused to permit this. He granted a complete perpetual injunction. Regardless of compensation, the injunction compels violation of the statute and the Fourteenth Amendment.

ARGUMENT.

One important reason for granting certiorari, specified in Rule 38 of this Court, is that the State court has decided a federal question probably not in accord with applicable decisions of this Court. This ground is of particular importance in Kentucky. The Courts of that State have shown such a great respect for contract rights, that they have often failed to fully appreciate legal principles of more general importance.

This attitude has caused Kentucky courts to give contract rights superiority over exercise of police power. In this case again the police power needs a friend and protector, to support the principle of equal rights among similar sewer users.

A. Police Power Has Had to Struggle.

Individual freedom has been a fundamental principle in the life and government of Kentuckians. Devotion to these rights has brought many decisions which have come to this Court.

(1) Lotteries preceded horse-racing in the vital life of Kentuckians. Schools, libraries, public buildings, even drains and sewers were built from lottery proceeds. Lotteries were authorized by statute. Frankfort sold one privilege with 30900 classes. A test case in the Kentucky Court of Appeals held that a lottery franchise was a property right. The 1891 Constitution provided that all lottery privileges are revoked. One Douglas still held the Frankfort franchise, which he operated in Louisville. The Commonwealth brought suit to stop this. Douglas pleaded *res adjudicata* and that the lottery privilege was a contract right under the Federal Constitution.

The Louisville *Law and Equity Court upheld* the *defenses.* The Kentucky Court of Appeals held that this contract right was subject to the police power. *Commonwealth* v. *Douglas,* 100 Ky. 116, 24 S. W. 233. Douglas was persistent, and this Court held that the franchise was not such a contract as the Constitution would protect against State exercise of the police power. *Douglas* v. *Commonwealth of Kentucky,* 168 U. S. 488, 42 L. Ed. 553.

(2) In September, 1871, Colonel E. L. Mottley and his wife were injured in a train collision. They settled their claims for an agreement for life-time passes.

The Railroad Company performed the contract until the June 29, 1906, amendment to the Interstate Commerce Act. When the Railroad Company hesitated to continue the passes, the Mottleys brought suit in the United States Circuit Court, claiming contract rights protected by the Federal Constitution. The Circuit Court *sustained* the Mottleys. *Mottley* v. *L. & N. R. R. Co.,* 150 Fed. 406. This Court directed dismissal for want of jurisdiction. *L. & N. R. R. Co.* v. *Mottley,* 211 U. S. 149, 53 L. Ed. 126, 29 S. Ct.

The Mottleys then brought suit in the Warren Circuit Court. *That Court sustained them.* On appeal, the *Kentucky Court of Appeals sustained them. L. & N. R. R. Co.* v. *Mottley,* 133 Ky. 652, 118 S. W. 982. Then this Court held that the contract could no longer be legally performed. *L. & N. R. R. Co.* v. *Mottley,* 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A. (N. S.) 671. (Then Colonel Mottley and the Railroad president settled amicably.)

(3) In 1894 James A. Murray conveyed a right of way to the trolley company which later operated between Frankfort and Lexington. He received as compensation life time passes for himself and family. In 1916 Kentucky passed an anti-pass law. Murray brought suit for a mandatory injunction. The *Franklin Circuit Court granted this.* The Kentucky Court of Appeals, however, held that this was a valid exercise of the police power and did not violate the Federal Constitution. *Ky. Traction & Terminal Co.* v. *Murray,* 176 Ky. 593, 195 S. W. 1119.

That case was brought to this Court, but dismissed. *Murray* v. *Ky. Traction & Terminal Co.*, 249 U. S. 628, 63 L. Ed. 806, 39 S. Ct. 388.

(4) In 1929 the Commissioners of Sewerage of Louisville purchased an easement through land now owned by respondent. Respondent claims that part of the consideration was free use of the sewer. In 1946 a statute was passed authorizing sewer service charges. Schedules of charges were established. Respondent claimed that his contract prevents any charges being made against him. The Circuit Court interpreted the contract as not giving free sewer use.

The Kentucky Court of Appeals met the question squarely, held that the contract right had superiority over exercise of the police power. So this case is now before this Court.

This Court has upheld the rights of a State Commission or City Board to regulate rates or practices despite interference with an existing contract:

As to transportation rates—

Producers Transportation Co. v. *Railroad Commission of California*, 251 U. S. 228, 64 L. Ed. 239, 49 S. Ct. 131;

Ortega Company v. *Triay, Receiver*, 260 U. S. 103, 67 L. Ed. 153, 43 S. Ct. 44.

As to electric rates—

Union Dry Goods Co. v. *Georgia Public Service Corporation*, 248 U. S. 372, 63 L. Ed. 309, 39 S. Ct. 117.

As to water rates—

Knoxville Water Co. v. *Knoxville,* 189 U. S. 434, 47 L. Ed. 887, 23 S. Ct. 531.

Except for the decision on the first appeal of this case, the Kentucky Court of Appeals has consistently, since this Court's decision in L. & N. v. Mottley, *supra,* held that contracts as to public utility services must give way to exercise of the police power.

L. & N. R. R. Co. v. *Crowe,* 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848;

Ky. T. & T. Co. v. *Murray,* 176 Ky. 593, 195 S. W. 1119;

L. & J. Co. Met. Sewer District v. *St. Matthews Sanitary Association,* 307 Ky. 207, 208 S. W. 2d 490.

In all but one of these cases the trial court upheld the contract right. In that one case it was not necessary to pass on that issue. In the lottery and anti-pass cases, the Kentucky Court of Appeals upheld the exercise of police power. In the Mottley case and the instant case, the Kentucky Court of Appeals upheld the contract right as against the exercise of police power.

This Court has consistently upheld this question of principle as against a contract with a public utility. We look with confidence and hope to such result here.

B. State Court Decision Not in Accord.

This Metropolitan District was created in the interest of health and to provide more adequate sewers. Section 19 of the 1946 Sewer Act (now K. R. S. 76.210) reads in part, as follows:

> "It is hereby found and declared that the creation of the District and the carrying out of its corporate purpose is in all respects in the interest of the public health and is a public purpose; that the District is performing a governmental function in the exercise of its powers conferred upon it by this Chapter . . ."

This Court has specifically recognized the fact that establishment of sewers is an exercise of police power with which previous contract rights cannot interfere.

> *New Orleans Gas Lt. Co.* v. *Drainage Commission,* 197 U. S. 453, 49 L. Ed. 831, 25 S. Ct. 471;
> *C. & A. R. R. Co.* v. *Tranbarger,* 238 U. S. 67, 59 L. Ed. 1204, 35 S. Ct. 678.

This Court has also determined that establishment of sewer rates is a legislative function, not affected by previous assessments for construction.

> *Carson* v. *Sewer Commissioners of Brockton,* 182 U. S. 398, 45 L. Ed. 1151, 21 S. Ct. 860.

RESUME'.

The effect of the decisions of the Kentucky Court of Appeals in this case is to have a federal question decided contrary to the cases decided by this Court, contrary to the other decisions by the Court of Appeals of Kentucky, and contrary to decisions generally in regard to these federal questions.

In order that the Metropolitan Sewer District may, in accordance with the Kentucky statute, provide sewer services at the same rate to similar users, it is necessary for this Court to grant the petition for certiorari, and take consideration of this case.

Respectfully submitted,

BLAKEY HELM,
Attorney for Petitioner.

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Supreme Court of the United States

October Term, 1951.

No. 309.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - *Petitioner,*

v.

THE B. F. GOODRICH COMPANY, - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Opinions of the State Court.

Louisville and Jefferson County Metropolitan Sewer District (herein called "Petitioner"), for the second time, seeks a review by this Court of the June 25, 1948, decision of the Court of Appeals of Kentucky (herein called the "Kentucky Court"), officially reported in 307 Ky. 689 (R 61-73).[1]

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[1] *Bond Bros.* v. *Louisville and Jefferson County Metropolitan Sewer Dist., et al.*, and *The B. F. Goodrich Co.* v. *Louisville and Jefferson County Metropolitan Sewer Dist., et al.*, 307 Ky. 689, 211 S. W. 2d 867.

In *Louisville and Jefferson County Metropolitan Sewer District* v. *Bond Bros.*, 339 U. S. 943, 94 L ed 1358, this Court denied Petitioner's application to review that decision of the Kentucky Court in which the Kentucky Court decided not only the *Bond Bros.* case, but this case. Petitioner makes no reference to this Court's earlier action.

By its decision, the Kentucky Court held valid and enforceable the reservation of a right to use a sewer for storm water and sewage drainage, which reservation, made contemporaneously with the grant of an easement for the construction of a sewer, was embodied in a deed and in a judgment (R 26, 62). Petitioner also seeks a review of the June 12, 1951, decision[1] (R 83) of the Kentucky Court on a subsequent appeal by it in this case, in which decision the Kentucky Court merely held that the issues raised had been determined by its former opinion.

The facts upon which the decision of the Kentucky Court is based and the decision of the Kentucky Court are applicable only to a tract of land near Louisville, Kentucky, a part of which is owned by Respondent and a part of which is owned by Bond Bros. The question presented is not one of any general importance in that area, or elsewhere.

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[1]*Louisville and Jefferson County Metropolitan Sewer District* v. *Goodrich*, (Ky.), 240 S. W. 2d 621, (not officially reported).

The Facts.

The circumstances under which the sewer easement was granted and the right to the use of the sewer reserved are stated in the opinion of the Kentucky Court (R 63). Producers Wood Preserving Company (herein called "Producers") owned a tract of 170 acres of which the land now owned by Respondent is a part. Producers used Paddy's Run, a creek which passed through the tract, for the disposal of a large volume of water utilized in its creosote plant. In 1929 Petitioner's predecessor, the Board of Sewerage Commissioners, sought to condemn an easement through the tract, following the course of Paddy's Run, for the purpose of constructing a large sewer. The resulting litigation was concluded with the entry of a judgment (R 26) and the execution by Producers of a deed of easement embodying the terms and conditions specified in the judgment.

In both the deed and judgment there expressly reserved by Producers the right to use without charge the sewer to be constructed. It was also expressly provided in the deed that all agreements and covenants should run with the land and be for the benefit of the successors and assigns of the parties (R 63).

From 1929 when the grant of easement was made until 1946 no objection was made to the use of the sewer by Producers and its successors without charge, although other property owners were required to pay sewer charges (R 65). When Petitioner was created by Act of General Assembly of Kentucky in 1946 (R 2)

and took possession and control of the sewer system theretofore owned by the City of Louisville, Petitioner asserted that it had been given the statutory power to charge Respondent for the use of the sewer and thus nullify the judgment formerly rendered and the reservation in the deed theretofore made, and thus destroy without payment of compensation the vested property right of Respondent to the use of the sewer.

Respondent filed this action (R 2) praying that Petitioner be perpetually enjoined from imposing a charge upon Respondent for use of the sewer. The trial court held that the judgment and deed reserved only the right to make a connection to the sewer without a charge and not the right to the use of the sewer without payment of sewer service charges subsequently imposed. The petition was dismissed in so far as it related to the use of the sewer without charge.[1]

On appeal the Kentucky Court reversed the judgment of the trial Court. Petitioner by this petition for writ of certiorari seeks a review of that decision (R 61-73).

The precise questions decided by the Kentucky Court are:

> 1. The judgment and deed to which Producers and Petitioner's predecessor were parties "granted Producers, for a valuable consideration, the use of this sewer and * * * such right and

[1]By its petition Respondent also challenged the right of Petitioner to charge higher rates for sewer service for property situated outside the City of Louisville than for property situated within the City. That question, ultimately determined contrary to the contention of Respondent, is not pertinent here.

use passed to its successors in title to the land for similar industrial purposes" (R 66).

2. Petitioner may not, without paying compensation, destroy Respondent's rights set forth in the deed and judgment to which Producers was a party, since there "is in fact no imperious demand requiring the use of the police power to take property without compensation or destroy a contract or nullify a judgment" (R 69).

3. Respondent's right to the use of the sewer is protected by the provisions of Sections 1 and 13 of the *Kentucky Constitution*,[1] which recognizes "as inalienable 'the right of acquiring and protecting property' and declares that the property of no citizen shall be taken 'or applied to public use without the consent of his representative and without just compensation being previously made to him' " (R 68).

The decision of the trial court denying the injunction prayed was reversed, the opinion of the Kentucky Court being to the effect that Respondent should have been granted an injunction. The case was remanded for proceedings consistent with the opinion.

Petitioner thereupon sought to re-try the issues and tendered in the trial Court a pleading designated as an amended answer and a counterclaim for declaration of rights (R 76), in which it urged as new and additional grounds for denial of the injunction:

(1) that the use reserved by Producers was limited to the improvements situated on the tract

[1]Appendix p. 18.

at the time of the grant of easement and reservation of right; and

(2) that Petitioner had abrogated that part of the contract with Producers "which was discriminatory and illegal, to-wit, the furnishing of services rent free for any sewerage" and had so notified Respondent and Bond Bros., the then owners of the tract in question; and that it offered to pay them the value of the easement acquired in 1928 "subject to credit for all payments made for said easement and subject to credit for all other considerations granted to said Producers Wood Preserving Company in said contract, including the sewer privileges heretofore enjoyed and the right to continued use of said main sewer for natural drainage."

The trial Court refused to permit the filing of the pleading tendered and granted the injunction as directed by the opinion of the Kentucky Court (R. 81).

The Kentucky Court held that the lower Court had correctly rejected the pleading tendered since the issues sought to be raised by tendered pleading had been determined on the first appeal. In its short opinion entered June 12, 1951 (R 83), the Kentucky Court expressly stated that all issues, including that sought to be raised by the petitioner with respect to the "limitation on the extent of the use * * * of the sewer," had been determined in *Bond Bros.* v. *Louisville and Jefferson County Metropolitan Sewer Dist., et al.,* and *The B. F. Goodrich Co.* v. *Louisville*

and Jefferson County Metropolitan Sewer Dist., et al., 307 Ky. 689, 211 S. W. 2d 867 (R 61).

As heretofore stated, this latter opinion is the opinion and decision of the Kentucky Court which this Court has heretofore declined to review. *Louisville and Jefferson County Metropolitan Sewer District* v. *Bond Bros.*, 339 U. S. 943, 94 L ed 1358.

ARGUMENT.

No question decided by the Kentucky Court is such as to give this Court jurisdiction.

First Point.

THE KENTUCKY COURT HAS NOT DECIDED A FEDERAL QUESTION.

As the first question presented (R 62), the Kentucky Court determined as a matter of construction of the language of a deed and judgment that Producers reserved the right to the use, without charge, of the sewer, and that such right passed to its successors in title for similar industrial purposes (R 66).

The Kentucky Court then examined the contention of Petitioner that it was authorized to abrogate the contract and judgment (R 66) and held:

> (1) that the public demand or necessity was far from being great, and that there was in fact no imperious demand requiring the exercise of the police power to take property without compensation, and thus nullify the deed and judgment by which valuable rights were reserved to Producers; and

(2) that in any event the right of Respondent to the use of the sewer was protected by Sections 1 and 13 of the *Kentucky Constitution* (R 68) which recognizes "as inalienable 'the right of acquiring and protecting property' and declares that the property of no citizen shall be taken 'or applied to the public use without the consent of his representative and without just compensation being previously made to him.' "

Petitioner (Br. 8, 12) attempts to raise the issue on this application for review that Petitioner has been denied constitutional rights. Even if Petitioner, a subdivision of the State, could conceivably have raised such an issue, no such contention, as shown by the Record, was advanced either in the lower Court or before the Court of Appeals.

There is thus no decision by the Kentucky Court of a Federal question.

Second Point.

REFERENCE BY THE KENTUCKY COURT TO FEDERAL DECISIONS WAS MERELY INCIDENTAL TO THE DECISION OF QUESTIONS OF KENTUCKY LAW.

In addition to a number of its own prior decisions, the Kentucky Court refers to the decisions in other jurisdictions relating to comparable questions. These include Illinois, Virginia, California, and other State Court decisions as well as decisions of this Court. Reference to a relevant decision of this Court no more indicates the determination of a Federal question than reference to a relevant decision of the Virginia Court indicates a determination of Virginia law. No deter-

mination of a Federal question was necessary to a decision of the case, and no language contained in the opinion supports the contention that the Court undertook to decide a Federal question.

In *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 79 L ed 191, this Court said:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Third Point.

IF IT BE CONSIDERED THAT A FEDERAL QUESTION WAS DECIDED, REVIEW SHOULD BE DENIED SINCE THE DECISION RESTS ON AN INDEPENDENT GROUND.

In the *Lynch case* (*supra*), there is the further statement:

> Where the judgment of the state court rests on two grounds, one involving a federal question and the other not * * * and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

Even if there were any basis in the language of the opinion upon which to raise the contention that the decision is based upon the construction of provisions of the *United States Constitution* as well as upon pro-

visions of the *Constitution of Kentucky,* nevertheless "the ground independent of a Federal question," *to-wit,* that based upon Sections 1 and 13 of the *Kentucky Constitution,* would be sufficient in and of itself to sustain the decision of the Court.

It is clear that the decision of the Kentucky Court did not require it to determine any Federal question. At best, the right claimed by Petitioner is only remotely assignable to a Federal question. Under such circumstances, no Federal question is presented here. *Southwestern Bell Telephone Co.* v. *State of Oklahoma,* 303 U. S. 206, 82 L ed 751; *Little* v. *Williams,* 231 U. S. 335, 58 L ed 256; *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 89 L ed 2092.

Fourth Point.

THIS COURT HAS ALREADY EXAMINED THE ISSUES PRESENTED BY THIS PETITION AND DENIED CERTIORARI.

Respondent is successor in title to a part of, and Bond Bros. to the balance of, the tract formerly owned by Producers which is subject to the easement and to which the reservation of right is appurtenant. When this controversy arose, Respondent and Bond Bros. filed separate actions for an adjudication of their respective rights. The actions were substantially similar; however, Bond Bros. sought a declaratory judgment while Respondent sought an injunction. The actions were consolidated for trial and were heard together on appeal. Only one opinion was handed down in the two cases (R 61). On return to the lower Court

an amended pleading was tendered by Petitioner in each case and was rejected by the Court. Petitioner promptly appealed from the judgment of the lower Court in each case; however, the appeal in this case was held not to have been perfected, *Louisville and Jefferson County Metropolitan Sewer District* v. *B. F. Goodrich Co.,* 312 Ky. 37, 223 S. W. 2d 887. The judgment entered in the *Bond Brothers* case was affirmed, *Louisville and Jefferson County Metropolitan Sewer District* v. *Bond Bros.,* 312 Ky. 600, 228 S. W. 2d 655.

Petitioner then applied to this Court for review and certiorari was denied. *Louisville and Jefferson County Metropolitan Sewer District* v. *Bond Bros.,* 339 U. S. 943, 94 L ed 1358.

Following its unsuccessful effort to obtain a review by this Court of the *Bond Bros.* case, Petitioner then perfected an appeal to the Kentucky Court in this case, with the result, as heretofore noted, that the Kentucky Court, affirming the second decision of the trial Court, held that the issues sought to be raised had been determined by the one opinion theretofore entered on the first appeals of this case and the *Bond Bros.* case.

Petitioner for a second time seeks to obtain a review by this Court of the issues heretofore determined by the Kentucky Court. No new question, applicable to a right of review by this Court, is presented. The contention that the use reserved was limited to the facilities existing at the time the reservation was made was advanced in the amended pleading tendered in this case, but was not raised in the *Bond Bros.* case. With respect, however, to the questions presented by

this petition, the two cases are in no way distinguishable.

This Court has already determined that on the facts presented certiorari would not be granted.

Fifth Point.

THE DECISION OF THE KENTUCKY COURT IS NOT ONE OF GENERAL IMPORTANCE.

Under no circumstances can it be said that the Kentucky Court has decided a question of general importance. The decision relates to one isolated tract of land in Jefferson County, Kentucky, having appurtenant rights as the result of a judgment and deed. It is not shown or even contended that any other tract of land has similar rights which would be affected by the decision in this case. Thus the narrow question presented is of no general importance even in the Jefferson County area. That it has no general importance or application elsewhere is evidenced by the fact that attention has not been directed to any decision of a similar question in any other jurisdiction.

As the Kentucky Court said (R 71), Respondent's "predecessor reserved or retained a right which it had, *viz.*, to use the same channel for drainage purposes." Other property owners served by the sewer did not have such a property right. The decision, applying provisions of the Kentucky Constitution, prevents Petitioner from confiscating Respondent's property right. If the elimination of that right is necessary for

the proper operation of the business of Petitioner, it may exercise its power of eminent domain[1] and compensate Respondent for the value of its right.

The principles relating to the right of a sovereign to exercise the police power, as announced by the Kentucky Court, are uniformly recognized by courts generally, and do not depart from decisions of this Court.

There is an express holding in this case that sewer construction or operation is within the police power, the Court saying:

> To accomplish that objective, the full force of the power may be applied, and that may require that property rights be subordinated even though they are otherwise within the protection of the Constitution. * * * If the menace has been removed, public necessity and general welfare have been met and served, and the object has been accomplished, the question is whether the police power may be asserted years afterward, to destroy property rights or to abrogate a contract made by the same unit of government in order to raise revenue to operate and maintain the facilities (R 66).

The limitations on such power are stated as follows:

> It is fundamental that such an extraordinary power is not without limitation for it may not operate unreasonably beyond the occasion or necessity of the case. It may not unreasonably invade private rights and thus violate those rights guaranteed under either the Federal or the State Constitution. The exercise of the power must

[1]Kentucky Revised Statutes §76.080; Appendix p. 16.

have a substantial basis and cannot be made a mere pretext for actions that do not come within the scope. To state it another way, the action of the government may not arbitrarily invade liberty or property rights under the guise of police regulation (R 67).

* * * * * * *

In the case at bar, the public demand or necessity is far from being great. There is in fact no imperious demand requiring the use of the police power to take property without compensation or destroy a contract or nullify a judgment (R 69).

CONCLUSION.

A considerable portion of the brief of Petitioner is devoted to such matters as, objection to the Kentucky Court's interpretation of the judgment and contract; a history of the police power in Kentucky;[1] alleged inconsistency between this decision and certain prior decisions of the State Court;[2] and a statement, outside the Record, to the effect that Petitioner has voluntarily ceased to discriminate against users of the sewers outside the City of Louisville.[3] It is not believed that these matters are relevant to the question sought to be presented nor that the extension of this brief in discussing them would be justified.

As pointed out by the Kentucky Court in its opinion, Petitioner's predecessor saw fit to acquire and pay for only a limited easement with respect to the tract

[1]Pet. page 20.
[2]Pet. page 24.
[3]Pet. page 10.

in question. If necessary or essential for the operation of its business, petitioner may, at any time, acquire the full easement by condemnation and payment of compensation therefor.[1]

The Kentucky Court correctly determined that the property right to use the sewer, a right appurtenant to an isolated tract of land and one not common to the owners of other property, should not be destroyed for the benefit of Petitioner and other property owners without compensation being made therefor.

No Federal question was determined by the Court and the decision is peculiar to the facts presented and not of general importance in the area served by the Petitioner or elsewhere.

The grounds upon which Petitioner applies for review in this case are in no respect distinguishable from those in its companion (the *Bond Bros.*) case, in which review by this Court has been denied.

Petition for writ of certiorari should be denied.

Respectfully submitted,

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Louisville, Kentucky,
October 8, 1951.

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[1]Appendix p. 16-7; *Kentucky Revised Statutes*, §76.080(6).

APPENDIX.

Kentucky Revised Statutes, §76.080.

General powers of district; rates, rentals and charges subject to approval of city legislative body. The district created under the provisions of this chapter is empowered:

(1) To have jurisdiction, control, possession, and supervision, of the existing sewer and drainage system of such city of the first class; to maintain, operate, reconstruct, and improve the same as a comprehensive sewer and drainage system, and to make additions, betterments, and extensions thereto, within the corporate limits of such city of the first class and within the limits of the county containing such city beyond such city limits, and to have all the rights, privileges, and jurisdiction necessary or proper for carrying such power into execution. No enumeration of powers in this chapter shall operate to restrict the meaning of this general grant of power or to exclude other powers comprehended within this general grant.

(2) To prepare or cause to be prepared and to be thereafter revised and adopted, plans, designs, and estimates of costs, of a system of trunk, intercepting, connecting, lateral, and outlet sewers, storm water drains, pumping and ventilating stations, disposal and treatment plants and work, and all other appliances and structures, which in the judgment of the board will provide an effective and advantageous means for relieving such city of the first class and areas in the county in which such city is located outside the city limits which may be embraced in the district, from inadequate sanitary and storm water drainage and from inadequate sanitary disposal and treatment of the sewage thereof, or such sections or parts of such system as the board may from time to time deem proper or convenient to construct, consistent with the plans and purposes of this chapter, and is authorized and empowered to take all such steps as the board may deem proper and necessary to effect the purposes hereof.

(3) To construct any additions, betterments, and extensions to the facilities of the district, by contract or contracts, or under, through, or by means of its own officers, agents, and employees. Provided, however, that before any construction of new sewers or the extension of any existing sewers is begun, the plans for all such projects shall, if said project is within the corporate limits of the City of Louisville, be first submitted to the Director of Works of the City of Louisville for approval by him, and, if so approved, then to be approved by ordinance adopted by the Board of Aldermen of the City of Louisville; and if said project is outside the corporate limits of the city of Louisville, the plans therefore shall then be first approved by the County Engineer of Jefferson County, and, if approved by him, then to be approved by proper action of the Fiscal Court of Jefferson County, except that if said project is without the corporate limits of the City of Louisville but within the corporate limits of any incorporated city, drainage district, or other political subdivision within Jefferson County, then such prior approval shall be obtained from the governing authorities of any such political subdivision or district.

(4) To establish, construct, operate, and maintain, as a part of the sewer and drainage system of the district, sewage treatment and disposal plants and systems and all the appurtenances and appliances thereunto belonging. Such sewage treatment and disposal plants may be located in the city, or beyond the limits of the city in the county in which the city is located, as the board may deem expedient.

(5) To acquire and hold such personal property as the board may deem necessary and proper for carrying out the corporate purposes of the district and to dispose of personal property when the district has no further need therefor.

(6) To acquire by purchase, gift, lease, or by condemnation, such real property or any interest, right, easement, or privilege therein, as the board may determine necessary, proper and convenient for the corporate purposes of the district, and to use the same so long as such corporate ex-

istence shall continue, and same is necessary or useful for the corporate purposes of the district. Condemnation proceedings may be instituted in the name of the district pursuant to a resolution of the board declaring the necessity for the taking, and the method of condemnation shall be the same as provided in KRS 416.120. When the board by resolution declares that any real property which it has acquired, or any interest therein, is no longer necessary or useful for the corporate purposes of the district, such real property and interest therein may be disposed of.

(7) To make bylaws and agreements for the management and regulation of its affairs and for the regulation of the use of property under its control and for the establishment and collection of sewer rates, rentals and charges, which sewer rates, rentals and charges, applicable within the limits of a city of the first class, shall be subject to the approval, supervision and control of the legislative body of such city as hereinafter provided.

(8) To make contracts and execute all instruments necessary or convenient in the premises.

(9) To borrow money and to issue negotiable bonds and to provide for the rights of the holders thereof.

(10) To fix and collect sewer rates, rentals, and other charges, for service rendered by the facilities of the district, which sewer rates, rentals, and other charges, applicable within the limits of a city of the first class, shall be subject to the approval, supervision and control of the legislative body of such city as hereinafter provided.

(11) To enter on any lands, waters and premises for the purpose of making surveys, and soundings and examinations.

Constitution of Kentucky, Sections 1 and 13.

SECTION 1. *Inherent and inalienable rights.*—All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

1. The right of enjoying and defending their lives and liberties.

2. The right of worshipping Almighty God according to the dictates of their consciences.
3. The right of seeking and pursuing their safety and happiness.
4. The right of freely communicating their thoughts and opinions.
5. The right of acquiring and protecting property.
6. The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.
7. The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons.

SECTION 13. *Jeopardy; property not to be taken without compensation.*—No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.